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Whistle With a Purpose: Extending Coverage Under SOX to Employees Discharging Their Duties

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WHISTLE WITH A PURPOSE: EXTENDING COVERAGE UNDER SOX TO EMPLOYEES DISCHARGING THEIR DUTIES

The relative ease with which corporate fraud went unnoticed during the Enron scandal created tension between Congress and the public. In hindsight, the public questioned the difference whistleblowers could have made if they were adequately protected. Since 2002, the Sarbanes-Oxley Act ("SOX") has provided anti-retaliation protection to employees of publicly traded companies. However, the language used in the whistleblower statute raises the question: Does SOX extend coverage to employees discharging their duties? The district courts have thus far correctly interpreted SOX as extending coverage to employees discharging their duties. Although this issue has only manifested itself in the district courts, it is crucial that Congress remain vigilant—foreseeing the consequences that would arise if courts start to deny whistleblower protection to those best suited to blow the corporate whistle.

INTRODUCTION

There are three underlying rationales for protecting whistleblowers.[1] First, by protecting employees who report employer wrongdoing, whistleblower protection promotes employers' compliance with the law.[2] Second, by providing whistleblower protection, the government and the taxpaying public can expend fewer resources on fixing the problems that unreported wrongdoings of government and corporate fraud cause.[3] Third,

1. Peter D. Banick, Note, *The "In-House" Whistleblower: Walking the Line Between "Good Cop, Bad Cop,"* 37 WM. MITCHELL L. REV. 1868, 1873 (2011) (defining whistleblowers as "employees who, in good faith and with a reasonable belief that their assertions are accurate, report, disclose, or otherwise make known . . . any violation of law by their employers . . . for the purpose of exposing such wrongdoing").

2. *Id.* at 1874–75. This protection provides safeguards for those employees who stand in a "unique position" to discover and report their employer's noncompliance or wrongdoing. *Id.* at 1875; Susan J. Spicer, *Turning Environmental Litigation on Its E.A.R.: The Effects of Recent State Initiatives Encouraging Environmental Audits*, 8 VILL. ENVTL. L.J. 1, 65 (1997) (addressing compliance as one of the goals of whistleblower protection); Julie Jones, Note, *Give a Little Whistle: The Need for a More Broad Interpretation of the Whistleblower Exception to the Employment-At-Will Doctrine*, 34 TEX. TECH L. REV. 1133, 1147 (2003) (stating that "[w]histleblowers play an important role in law enforcement by acting as a means to police employers' business practices").

3. *See* Banick, *supra* note 1, at 1875–76; *see also* Gerard Sinzdak, *An Analysis of Current Whistleblower Laws: Defending a More Flexible Approach to Reporting Requirements*, 96 CALIF. L. REV. 1633, 1636 (2008) (discussing the reduction in enforcement costs to the public due to

whistleblower protection is necessary not only to deter employers from committing wrongful acts, but also to encourage employees to report these wrongful acts.[4] By providing whistleblower protection, employees can freely report their employer's misdeeds without fear of retaliation.[5]

The policy rationales noted above also apply to the whistleblower provision of the Sarbanes Oxley Act of 2002 ("SOX").[6] Section 806 of SOX provides whistleblower protection to an employee of a publicly traded company who reports information regarding violations relating to mail fraud, wire fraud, bank fraud, securities fraud, any rule or regulation of the Securities and Exchange Commission ("SEC"), or any provision of federal law relating to fraud against shareholders.[7] Congress implemented the whistleblower provisions of SOX "to help rectify a culture, supported by law that discourage[s] employees from reporting fraudulent behavior."[8]

Although some scholars "praise the whistleblower protections of the Sarbanes-Oxley Act of 2002 as one of the most protective anti-retaliation provisions in the world," many whistleblowers have failed to seek protection under SOX.[9] One reason for this is that, unlike other general whistleblower statutes, SOX is tailored to protect only six particular types of violations.[10] Furthermore, the tersely worded and unclear statutory

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whistleblowers); S. REP. NO. 107-146, at 5 (2002) (noting that the corporate code of silence, if overlooked, would create serious and adverse consequences for investors and for the stock market).

4. *See* John A. Gray, *Is Whistleblowing Protection Available Under Title IX?: An Hermeneutical Divide and the Role of Courts*, 12 WM. & MARY J. WOMEN & L. 671, 673 (2006) (stating that it is unjust to penalize employees who make reports in good faith); *see also* Nancy M. Modesitt, *The* Garcetti *Virus*, 80 U. CIN. L. REV. 137, 155–56 (2011) (stating that employees should not be forced to "choose between losing their jobs and exercising" their right to "protect public money, promote safety, . . . [and] encourage compliance with the law").

5. *See* Banick, *supra* note 1, at 1876.

6. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, § 806, 116 Stat. 745, 802 (codified at 18 U.S.C. § 1514A).

7. *Id.*

8. Leshinsky v. Telvent GIT, S.A., 942 F. Supp. 2d 432, 440 (S.D.N.Y. 2013) (quoting S. REP. NO. 107-146, at 4–5 (2002)) (internal quotation marks omitted) (alteration in original); *see also* S. REP. NO. 107-146, at 5 (2002) (finding that the corporate code of silence creates "a climate where ongoing wrongdoing can occur with virtual impunity").

9. Richard E. Moberly, *Unfulfilled Expectations: An Empirical Analysis of Why Sarbanes-Oxley Whistleblowers Rarely Win*, 49 WM. & MARY L. REV. 65, 65 (2007); *see also* Norman D. Bishara et al., *The Mouth of Truth*, 10 N.Y.U. J.L. & BUS. 37, 47–49 (2013) (footnotes omitted) ("While hailed as an improvement in the evolution of whistleblower laws, in the decades after SOX's passage as a response to corporate scandals, SOX was criticized for not providing enough protection for whistleblowers, for its lack of extraterritorial reach, for being obtrusive, and for not playing a role in exposing the high-profile frauds that precipitated the financial crisis and recession of 2008.").

10. Sarbanes-Oxley Act of 2002 § 1514A; *see also Sarbanes-Oxley*, KATZ, MARSHALL & BANKS, http://www.kmblegal.com/legal_topics/whistleblower-law/sarbanes-oxley/ (last visited Feb. 5, 2016), *archived at* http://perma.cc/4LKH-AQZF. "If an employee complains about violations of state

language of SOX has led to differing interpretations regarding the scope of protection provided to employees.[11] This has led scholars to question whether whistleblower protection extends to employees of private contractors[12] and to employees discharging their duties.[13]

This Note addresses whether SOX covers employees discharging their duties.[14] Employees are discharging their duties when they act in accordance with their job responsibilities and obligations. For example, an accountant is discharging his duties when he spots an accounting irregularity and reports the irregularity to his supervisor. These types of employees are crucial to spotting corporate fraud because of their roles and positions within the company.[15] Without whistleblowing by these employees, the public and the government are susceptible to another Enron-like debacle.[16] SOX fails to define the term "employee," which has led to debates about how restrictively the term "employee" should be applied.[17] Clearly delineating the type of employee covered under SOX is paramount because employees discharging their duties will not rely on SOX if they are not assuaged of their fears of employer retaliation.[18]

To fully grasp the importance of extending protection under SOX to employees discharging their duties, this Note details the chronological history of whistleblower protection (i) prior to SOX,[19] (ii) under SOX, and (iii) under the Dodd-Frank Act ("Dodd-Frank") and *Lawson v. FMR LLC*. Specifically, Part I briefly addresses how *Garcetti v. Ceballos*[20] and the

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regulations, without reference to possible federal law violations, the employee will not be protected by SOX." *Id.*

11. Spinner v. David Landau & Assocs., LLC, ARB Nos. 10-111, 10-115, ALJ No. 2010-SOX-029, 2012 WL 1999677, at *16 (Dep't of Labor May 31, 2012).

12. *See, e.g.*, Ryan McCarthy, *Up in the Air:* Lawson v. FMR LLC *& the Scope of Sarbanes-Oxley Whistleblower Protection*, 9 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 144 (2013).

13. *See, e.g.*, Yang v. Navigators Grp., Inc., 18 F. Supp. 3d 519 (S.D.N.Y. 2014).

14. The private contractor issue is discussed in *Lawson v. FMR LLC*. *See infra* Part III.D.

15. *See infra* notes 207–11 and accompanying text.

16. To perceive the impact that whistleblowers can have on preventing corporate fraud, it is important to understand the main catastrophe that gave rise to SOX: Enron. Further, it is crucial to understand that history can repeat itself. *See* S. REP. NO. 107-146, at 11 (2002) (alluding to the real possibility that other public companies are engaging in corporate fraud, yet "simply eluding discovery").

17. *See infra* notes 183–86 and accompanying text.

18. *See* MARION G. CRAIN, PAULINE T. KIM & MICHAEL SELMI, WORK LAW: CASES AND MATERIALS 505 (3d ed. 2015) (stating that the majority believed that professional obligations by accountants and lawyers to blow the whistle without any protection would be insufficient incentives to do so).

19. Whistleblower protection has evolved from protection under the First Amendment and the common law to specific legislative enactment of state and federal whistleblower statutes. CRAIN, KIM & SELMI, *supra* note 18, at 493; *see also infra* Part I.

20. 547 U.S. 410 (2006).

Whistleblower Protection Act ("WPA")[21] have declined protection to employees discharging their duties.[22] Part II then introduces the events leading up to SOX, analyzes the congressional intent behind the enactment of SOX, and discusses why the statute has been ineffective thus far. Part III then summarizes how Dodd-Frank amended SOX and discusses *Lawson v. FMR LLC*,[23] a recent Supreme Court case, as an example of how courts have struggled with interpreting the coverage SOX provides to different kinds of employees.[24] Part IV addresses the emerging split at the district court level regarding whether employees discharging their duties are protected under SOX. Part V analyzes the WPA and considers how SOX should be read in light of how the WPA has dealt with employees discharging their duties. Finally, Part VI proposes that the recent SDNY decision in *Yang v. Navigators Group, Inc.*,[25] which extended coverage to employees discharging their duties, is the best interpretation of SOX that furthers the purpose Congress had in mind when it enacted SOX in 2002.

I. WHISTLEBLOWER PROTECTION PRIOR TO SOX

A. Protected Speech Under the First Amendment and Common Law

Before statutory protections existed for whistleblowers, employees had to rely on either the First Amendment or the common law for protection.[26] Under the First Amendment, public employees could allege that their speech was protected because they were speaking as citizens on matters of public concern.[27] Under the common law, at-will employees alleged that they were wrongfully discharged in violation of a known and accepted public policy.[28]

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21. Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (codified at 5 U.S.C. §§ 1201–1222).

22. For the purposes of this Note, the language "employees discharging their duties" is synonymous with "arising out of one's job duties."

23. 134 S. Ct. 1158 (2014).

24. The analysis in *Lawson* is used as an argument for extending coverage under SOX to employees discharging their duties. *See infra* Part VI.

25. Yang v. Navigators Grp., Inc., 18 F. Supp. 3d 519 (S.D.N.Y 2014); *see also infra* notes 155–56 and accompanying text.

26. *See generally* CRAIN, KIM & SELMI, *supra* note 18, at 460 (noting how different types of employees sought protection).

27. *Id.* at 460.

28. *See, e.g.*, Petermann v. Int'l Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, Local 396, 344 P.2d 25, 27 (Cal. Ct. App. 1959). For example, Petermann was discharged for refusing to testify falsely before a state legislative committee. In recognizing the interests of the state, the court reasoned that "[i]t would be obnoxious . . . to allow an employer to discharge any employee . . . on the ground that the employee declined to commit perjury." *Id.*; *see also*

However, both the First Amendment and the common law are limited in providing whistleblower protection. In fact, constitutional protection under the First Amendment only applies to public government employees, and it is limited to speech that (1) does not arise out of one's job duties,[29] (2) is truly a matter of public concern,[30] and (3) outweighs the government employer's interest "in promoting the efficiency of the public services it performs through its employees."[31] Similarly, the public policy exception does not apply in every state, and even where the exception does exist, it must be tied to a public policy that society is willing to recognize.[32] Although some whistleblower protection existed under the First Amendment and the common law, Congress enacted more concrete statutory protection for whistleblowers under the WPA and SOX.[33]

B. Whistleblower Protection Act of 1989

The WPA[34] was enacted in 1989 to protect "employees who disclose Government illegality, waste, and corruption."[35] The statute applies to

> *any disclosure* of information by an employee . . . which the employee . . . reasonably believes evidences—(A) a violation of any law, rule, or regulation; or (B) gross mismanagement, a gross waste

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Charles J. Muhl, *The Employment-At-Will Doctrine: Three Major Exceptions*, MONTHLY LAB. REV., Jan. 2001, *available at* http://www.bls.gov/opub/mlr/2001/01/art1full.pdf.

29. *See generally* Garcetti v. Ceballos, 547 U.S. 410 (2006) (stating that speech made pursuant to one's job duties is not protected under the First Amendment).

30. *See generally* Connick v. Myers, 461 U.S. 138 (1983) (creating a threshold question to exclude an employee's speech that is purely proprietary in nature).

31. CRAIN, KIM & SELMI, *supra* note 18, at 461; *see also generally* Pickering v. Bd. of Educ., 391 U.S. 563 (1968) (laying out the basic framework for balancing the interest between the citizen employee and the government employer).

32. *See generally* Muhl, *supra* note 28, at 6 (noting how different states define public policy and listing the seven states that have outright rejected the public policy exception). *Compare* Strozinsky v. Sch. Dist. of Brown Deer, 614 N.W.2d 443, 445 (Wis. 2000) (quoting Winkelman v. Beloit Memorial Hospital, 483 N.W.2d 211 (Wis. 1992)) (considering the "'spirit as well as the letter'" of the law in determining public policy), *with* Gantt v. Sentry Ins., 824 P.2d 680, 687–88 (Cal. 1992) (allowing for a wrongful-discharge tort when the public policy is "carefully tethered to fundamental policies that are delineated in constitutional or statutory provisions").

33. *See* Jones, *supra* note 2, at 1163 (noting that the passage of SOX is evidence of Congress and the public taking whistleblowing more seriously).

34. Whistleblower Protection Act of 1989, Pub. L. No. 101-12, 103 Stat. 16 (codified at 5 U.S.C. §§ 1201–1222).

35. *Id.* (noting in the "Findings and Purpose" Section how this served the public interest and created "a more effective civil service").

> of funds, an abuse of authority, or a substantial and specific danger to public health or safety.[36]

Despite seemingly clear statutory language[37] and legislative history,[38] the Federal Circuit interpreted the WPA to exclude employees discharging their duties in *Willis v. Department of Agriculture*[39] and *Huffman v. Office of Personnel Management*.[40]

C. Willis v. Department of Agriculture *(1998)*

In 1998, a plaintiff-employee sought protection under the WPA after reporting that some of the conservation farms he worked for were out of compliance with the Department of Agriculture's approved conservation plans.[41] In denying coverage to the plaintiff-employee, the US Court of Appeals for the Federal Circuit ("Federal Circuit") stated that the goal of the WPA is to "protect government employees who risk their own personal job security for the advancement of the public good by disclosing abuses by government personnel."[42] Plaintiff-employee's job responsibility was to report when farms were out of compliance. This responsibility did not put him at "personal risk for the benefit of the public good."[43] Due to these reasons, plaintiff-employee's claim was dismissed for failing to allege any protected disclosure that satisfied the WPA's jurisdictional prerequisites.[44]

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36. 5 U.S.C. § 1213(a)(1) (2014) (emphasis added).

37. *See* Modesitt, *supra* note 4, at 149 (stating that "the plain language is unambiguous and . . . supports the interpretation that a disclosure made in the course of one's normal job duties is protected").

38. *See* Modesitt, *supra* note 4, at 149 (arguing that the legislative history is also clear because Congress amended the language from "a disclosure" to "any disclosure" when it amended the Civil Service Act of 1978).

39. 141 F.3d 1139 (Fed. Cir. 1998).

40. 263 F.3d 1341 (Fed. Cir. 2001); *see also infra* notes 41–50 and accompanying text.

41. *Willis*, 141 F.3d at 1139.

42. *Id.* at 1444 (finding that extending coverage to an employee in this situation would broaden protection to nearly every report dealing with a possible breach of a law or regulation).

43. *Id.*; *see also* Langer v. Dep't of the Treasury, 265 F.3d 1259, 1267 (Fed. Cir. 2001); Herman v. Dep't of Justice, 193 F.3d 1375, 1381 (Fed. Cir. 1999) ("[T]he WPA was enacted to protect employees who report genuine violations of law, not to encourage employees to report minor or inadvertent miscues occurring in the conscientious carrying out of a federal official or employee's assigned duties.").

44. *Willis*, 141 F.3d at 1145.

D. Huffman v. Office of Personnel Management *(2001)*

In line with *Willis*, the Federal Circuit in *Huffman v. Office of Personnel Management*[45] found that a plaintiff-employee's complaints to a supervisor about the supervisor's conduct did not constitute a disclosure under the WPA.[46] The court came to this conclusion because the WPA defines disclosure as "reveal[ing] something . . . hidden and not known."[47] Therefore, a plaintiff-employee must go "above and beyond the call of duty and report infractions of law that are hidden."[48] This means that a plaintiff-employee with investigatory responsibilities must report wrongdoing outside of normal channels to constitute a disclosure that reveals something unknown to the general public.[49] In the end, the Federal Circuit affirmed the lower court's finding that plaintiff-employee's complaint to his supervisors did not constitute a protected disclosure.[50]

E. Garcetti v. Ceballos *(2006)*

Although this idea of excluding employees based on their job duties stems from common law interpretations of the WPA, it has spread, with the help of *Garcetti*, to other statutes as well.[51]

In 2006, the Supreme Court held that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."[52] In this case, Richard Ceballos, a district attorney, claimed that he was "subjected to a series of retaliatory employment actions" after he notified his supervisors of the misrepresented facts in a search warrant affidavit.[53] In finding for

45. 263 F.3d 1341.

46. *Id.* at 1344.

47. *Id.* at 1350 (finding it "quite significant that Congress in the WPA did not use a word with a broader connotation such as 'report' or 'state'"); *see also* 5 U.S.C. § 2302(b)(8) (2014) (giving further guidance by stating that disclosures within normal channels and reports of publicly known information do not constitute protected disclosures under the WPA).

48. *Huffman*, 263 F.3d at 1353.

49. *Id.* at 1354. The underlying premise is that the report is something society has to know and that the need to know is so great that an employee is willing to risk her job for the betterment of society. The court gives an example of a "law enforcement officer who is responsible for investigating crime by government employees who, feeling that the normal chain of command is unresponsive, reports wrongdoing outside of normal channels." *Id.*

50. *Id.* at 1355.

51. *See* Modesitt, *supra* note 4, at 195 (calling it the "*Garcetti* Virus" and "analyzing the degree to which the job duties exclusion has infected [other] statutes").

52. Garcetti v. Ceballos, 547 U.S. 410, 421 (2006).

53. *Id.* at 415.

the government employer, Justice Kennedy stated, "Ceballos did not act as a citizen when he went about conducting his daily professional activities" and "did not speak as a citizen by writing a memo that addressed the proper disposition of a pending criminal case."[54] Instead, by discharging his duties, he "acted as a government employee" and therefore his speech was not protected under the First Amendment.[55]

Despite the fact that "*Garcetti* involved a constitutional, [rather than] a statutory, claim, the decision has given new life to the doctrine" of excluding employees discharging their duties.[56] The impact *Garcetti* has is evident in the common law interpreting the WPA, and this can be a useful starting point in analyzing the protection afforded under SOX to employees discharging their duties.[57]

II. WHISTLEBLOWER PROTECTION UNDER SOX

A. The Rise and Fall of Enron

In 1985, two gas companies merged to form Enron, a Houston-based energy-trading corporation.[58] Within a short span of fifteen years, Enron grew to become America's seventh largest company.[59] Enron's success, however, was based on a series of scams and fraudulent accounting practices that misstated its income.[60] In October 2001, investigations revealed that Enron had created partnerships with off-the-book entities that

54. *Id.* at 422.

55. *Id.*

56. Modesitt, *supra* note 4, at 137.

57. *See infra* Part VI.

58. *Enron Files for Bankruptcy*, THE HIST. CHANNEL, http://www.history.com/this-day-in-history/enron-files-for-bankruptcy (last visited Feb. 5, 2016), *archived at* https://perma.cc/QJ6N-SNJR. In 1985, Houston Natural Gas and InterNorth merged under Chairman and CEO Kenneth Lay. *Id.*

59. *Id.* (noting that Enron rose as high as number seven on the Fortune 500 list and employed 21,000 people with a posted revenue of $111 billion in 2000); *see also The 10 Worst Corporate Accounting Scandals of All Time*, ACCT. DEGREE REV., http://www.accounting-degree.org/scandals/ (last visited Jan. 8, 2015), *archived at* https://perma.cc/T4NT-9Y87 (stating that Enron had been named America's Most Innovative Company each of the six years prior to its scandal).

60. *See* S. REP. NO. 107-146, at 2 (2002) ("[W]ith the approval or advice of its accountants, auditors and lawyers, [Enron] used thousands of off-the-book entities to overstate corporate profits, understate corporate debts and inflate Enron's stock price."); *Enron Scandal at-a-Glance*, BBC NEWS (Aug. 22, 2002, 4:59 PM), http://news.bbc.co.uk/2/hi/business/1780075.stm, *archived at* https://perma.cc/GQQ6-YPQD ("Enron lied about its profits and stands accused of a range of shady dealings, including concealing debts so they didn't show up in the company's accounts."); *The Fall of Enron*, NPR, http://www.npr.org/news/specials/enron/ (last visited Feb. 4, 2016), *archived at* http://perma.cc/Y5MV-6A4R (finding that Enron's income and equity value was a few billion dollars less than its balance sheet reflected).

hid massive amounts of debt from the public.[61] At its peak, Enron stock sold for over $90 per share, but by the time the Enron scandal was revealed, the stock dropped to $0.26 as investors and creditors retreated.[62]

Soon thereafter, Enron filed for Chapter 11 bankruptcy, which resulted in the loss of jobs, pensions, and billions of dollars in stock value.[63] Further investigation revealed that "company officials willfully ignored internal warnings about the accounting irregularities even as they pocketed millions of dollar in stock-market gains."[64] In addition, Arthur Andersen, Enron's auditing company, was found guilty of both perpetrating corporate fraud and destroying evidence.[65] This led to thousands of angry investors, employees, and pension holders wondering why no one within either Enron or Arthur Andersen reported any of the extensive accounting improprieties.[66] To make matters worse, between 2001 and 2002, WorldCom, a major telecommunications company, was also caught engaging in corporate malfeasance.[67]

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61. Larry E. Ribstein, *Market vs. Regulatory Responses to Corporate Fraud: A Critique of the Sarbanes-Oxley Act of 2002*, 28 J. CORP. L. 1, 4 (2002) ("Enron gave the impression of ever-increasing earnings and stable finances through extensive derivatives trading and profitable transactions with special purpose entities (SPEs), which also yielded substantial gains for Enron insiders."); S. REP. NO. 107-146, at 2–3 (2002) ("The partnerships—with names like Jedi, Chewco, Rawhide, Ponderosa and Sundance—were used essentially to cook the books and trick both the public and federal regulators about how well Enron was doing financially.").

62. *Enron Files for Bankruptcy*, *supra* note 58; *Enron Scandal at-a-Glance*, *supra* note 60.

63. *Enron Files for Bankruptcy*, *supra* note 58 (finding that the collapse of Enron led to the loss of 5600 jobs and the liquidation of almost $2.1 billion in pension plans); *The Fall of Enron*, *supra* note 60.

64. *The Fall of Enron*, *supra* note 60; *see also* Robert H. Tillman & Michael L. Indergaard, *Pump and Dump*, WASH. POST (Feb. 22, 2006, 1:00 PM), http://www.washingtonpost.com/wp-dyn/content/discussion/2006/02/21/DI2006022100575.html, *archived at* perma.cc/P9LZ-UYNW (noting that Enron officials used a "pump and dump" scheme which "artificially inflated stocks and securities in order to [allow Enron officials] to sell their shares at higher prices, leaving any fall-out and responsibility on naive investors").

65. *See The Fall of Enron*, *supra* note 60 ("Arthur Andersen . . . at best neglected to recognize the company's problems. At worst . . . the auditor was complicit in perpetrating one of the biggest frauds in corporate history."); Ribstein, *supra* note 61, at 11 (arguing that the problem involves a combination "of excessive ties between auditing firms and the companies they are supposed to be scrutinizing, [and] inadequate review of the accounting firm's work by corporate audit committees"); *see also Enron Files for Bankruptcy*, *supra* note 58 (finding that Arthur Andersen's auditors were guilty of deliberately destroying documents incriminating to Enron); S. REP. NO. 107-146, at 4 (2002) (stating that employees were instructed to "work overtime if necessary to accomplish the destruction").

66. *See The Fall of Andersen*, CHI. TRIB. (Sept. 1, 2002), http://www.chicagotribune.com/news/chi-0209010315sep01-story.html#page=1 (stating that the 90-year-old auditing firm "shunted aside accountants who failed to adapt to the firm's new direction" by forcing out "roughly one of every 10 auditing partners and . . . watchdogs" as the firm "embarked on a path that valued hefty fees ahead of bluntly honest bookkeeping"); *Enron Scandal at-a-Glance*, *supra* note 60 (noting that the Enron scandal prompted "the accounting industry to take a hard look at itself").

67. Simon Romero & Riva D. Atlas, *WorldCom's Collapse: The Overview; WorldCom Files for Bankruptcy; Largest U.S. Case*, N.Y. TIMES (July 22, 2002), http://www.nytimes.com/2002/07/22/

"In order to keep [financial] reports in line with Wall Street's expectations," WorldCom filed reports claiming billions in false profits.[68] In the end, the company filed for bankruptcy and dismissed more than 20,000 employees.[69]

B. The Purpose Behind Enacting the Sarbanes-Oxley Act of 2002

As a result of Enron's massive corporate scandal, the Sarbanes-Oxley Act of 2002,[70] also known as the Public Company Accounting Reform and Investor Protection Act, was promulgated.[71] By enacting SOX, Congress intended to prevent corporate fraud and create stability in the financial markets.[72] In order to accomplish this goal, SOX seeks to limit information asymmetry.[73] By making financial statements of public companies more transparent, SOX hoped to make the information that investors receive more accurate and representative of the financial health and status of a company.[74]

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us/worldcom-s-collapse-the-overview-worldcom-files-for-bankruptcy-largest-us-case.html, *archived at* http://perma.cc/5TJ9-7DZ4; *The 10 Worst Corporate Accounting Scandals of All Time*, *supra* note 59 (noting that WorldCom inflated $11 billion in assets, which led to 30,000 lost jobs and a loss of $180 billion for investors); *see also generally* Dick Carozza, *Extraordinary Circumstances: An Interview with Cynthia Cooper*, FRAUD MAG., Mar./Apr. 2008, http://www.fraud-magazine.com/article.aspx?id=210, *archived at* http://perma.cc/B4FZ-Z6DU (reporting that WorldCom's stock prices fell from $64 to $0.83); David Hancock, *World-Class Scandal at WorldCom*, CBS NEWS (June 26, 2002, 9:23 AM), http://www.cbsnews.com/news/world-class-scandal-at-worldcom, *archived at* http://perma.cc/7YU9-VZHS.

68. Jennifer S. Recine, *Examination of the White Collar Crime Penalty Enhancements in the Sarbanes-Oxley Act*, 39 AM. CRIM. L. REV. 1535, 1542–45 (2002).

69. *Id.*; *see also* Theodore F. di Stefano, *WorldCom's Failure: Why Did It Happen?*, E-COMMERCE TIMES (Aug. 19, 2005, 7:00 AM), http://www.ecommercetimes.com/story/45542.html, *archived at* http://perma.cc/PN7N-AK5Q (internal quotation marks omitted) (noting that "a lack of effective checks and balances on the power of senior management" along with a lack of transparency gave rise to WorldCom's massive corporate fraud).

70. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745 (2002); S. REP. NO. 107-146, at 2 (2002) ("The [Sarbanes-Oxley Act] was introduced by Senator Patrick Leahy, with Senators Daschle, Durbin, and Harkin as original cosponsors, on March 12, 2002.").

71. By a vote of 99-0 in the Senate and 423-3 in the House or Representatives, SOX was passed and sent to President George W. Bush, who signed the statute into law on July 30, 2002. JAMES S. TURLEY & STEVE HOWE, ERNEST & YOUNG LLP, THE SARBANES-OXLEY ACT AT 10: ENHANCING THE RELIABILITY OF FINANCIAL REPORTING AND AUDIT QUALITY (2012), *archived at* http://perma.cc/R7Q3-6B9Q.

72. Lawson v. FMR LLC, 134 S. Ct. 1158, 1161 (2014) (stating that the Sarbanes-Oxley Act was passed to "safeguard investors in public companies and restore trust in the financial markets").

73. Clayton Brite, *Is Sarbanes-Oxley a Failing Law?*, U. CHI. UNDERGRAD. L. REV., June 30, 2013, at 1–3, *archived at* http://perma.cc/W8NC-3DWC (defining information asymmetry as "a situation in which one party in a transaction has more or superior information compared to another").

74. *Id.* at 3; *see also* S. REP. NO. 107-146, at 11 (2002) (stating that the "majority of Americans depend on capital markets to invest in the future needs of their families" and that greater accountability and transparency would help the financial markets to function properly).

Congress included four titles within SOX that helped create this transparency.[75] Title I of SOX established the Public Company Accounting Oversight Board ("PCAOB").[76] The PCAOB effectively ended "over 100 years of self-regulation" and self-auditing by providing audit services for public companies.[77] Title II established auditor independence by creating ways to limit conflicts of interest.[78] Title III enhanced transparency and accountability by holding management executives fully responsible for the accuracy and completeness of their companies' financial statements.[79] Finally, Title IV required internal controls for assessing internal disclosures by employees of the public company.[80] These four titles work together to ensure that the public is not misled as to the financial status of any publicly traded company.[81]

Another major component of SOX, Section 806, provides protection to non-governmental whistleblowers. Prior to the enactment of SOX, whistleblowers of publicly traded companies did not receive any statutory protection.[82] As an example, Sherron Watkins, former Vice-President of Enron, received no protection under Texas law[83] when Enron retaliated against her for warning the Chairman of accounting improprieties within

75. Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, §§ 101–409, 116 Stat. 745, 750–791 (2002). For brevity, this Note only mentions the first four of the eleven titles. The main focus is on Title VIII and the whistleblower provisions of SOX.

76. *See id.* §§ 101–109 (codified at 15 U.S.C. §§ 7211–7219).

77. *See* TURLEY & HOWE, *supra* note 71, at 1–3.

78. Sarbanes-Oxley Act of 2002 §§ 201–209. For example, Title II prohibits audit firms from providing certain non-audit services to clients and requires audit partners to rotate every five years instead of every seven. *Id.* § 203.

79. *Id.* §§ 301–308; *see also* TURLEY & HOWE, *supra* note 71, at 6.

80. Sarbanes-Oxley Act of 2002 §§ 401–409; *see also* Shannon Kay Quigley, *Whistleblower Tug-Of-War: Corporate Attempts to Secure Internal Reporting Procedures in the Face of External Monetary Incentives Provided by the Dodd-Frank Act*, 52 SANTA CLARA L. REV. 255, 262 (2012) (enumerating what SOX demands of corporations); Ribstein, *supra* note 61, at 11–19.

81. By calling for greater accountability, SOX seeks to quell public mistrust in the financial markets post-Enron.

82. S. REP. NO. 107-146, at 19 (2002) ("[C]urrent law protects many government employees . . . [but] there is no similar protection for employees of publicly traded companies who blow the whistle on fraud and protect investors. With one in every two Americans investing in public companies, this distinction fails to serve the public good."); *see also* CRAIN, KIM & SELMI, *supra* note 18, at 498 (raising "questions about how such extensive accounting irregularities and outright fraud could go on undetected for years" and wondering if whistleblowers "could have stopped or exposed these fraudulent practices"); Banick, *supra* note 1, at 1877 (noting that the Whistleblower Protection Act of 1989 only provided protection to federal employees).

83. *See generally* Sabine Pilot Serv., Inc. v. Hauck, 687 S.W.2d 733, 735 (Tex. 1985) (holding that the at-will rule only applied when an employee refused to perform an illegal act that carried criminal penalties).

the company.[84] Furthermore, it was found that many of Enron's employees and executives "did not feel secure enough in their jobs to question irregularities."[85] As a result, Congress added protection for whistleblowers to encourage employees to disclose, in good faith, securities law violations by their employers, without fear of retaliation.[86]

C. Effectiveness of SOX

The debate over the effectiveness of SOX continues to this day.[87] Proponents of SOX, such as President George W. Bush, describe the statute as a huge improvement for whistleblower protection,[88] and "among the most far reaching reforms of American business practices since the time of Franklin Delano Roosevelt."[89] At the time of SOX's enactment, "the public applauded Congress for their fast action."[90] In hindsight, however, this swift reaction by both houses of Congress has been described as "a knee-jerk reaction . . . that was perhaps not fully thought through."[91]

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84. *See* Kathleen F. Brickey, *From Enron to WorldCom and Beyond: Life and Crime After Sarbanes-Oxley*, 81 WASH. U. L.Q. 357, 363 (2003) (noting how Sherron Watkins had been "reassigned from her executive suite to a starkly furnished office 33 floors below and relegated to performing make-work tasks"); *Enron Whistleblower Tells of 'Crooked Company,'* NBC NEWS (Mar. 15, 2006, 7:46 PM), http://www.nbcnews.com/id/11839694/ns/business-corporate_scandals/t/enron-whistleblower-tells-crooked-company/#.Vzjw_pMrIdV, *archived at* http://perma.cc/Q3S4-N44G; *see also* S. REP. NO. 107-146, at 5 (2002) (listing several examples of Enron employees who were retaliated against for either expressing reservations to management, repeatedly warning executives, or advising clients to sell Enron stock).

85. *As Enron Purged Its Ranks, Dissent Was Swept Away*, N.Y. TIMES (Feb. 4, 2002), http://www.nytimes.com/2002/02/04/business/04EXOD.html?pagewanted=all, *archived at* http://perma.cc/RZ3D-LN52; *see also* S. REP. NO. 107-146, at 5 (2002) (finding that Enron's employees who attempted to blow the whistle "were discouraged at nearly every turn"); Carozza, *supra* note 67 (explaining how Cynthia Cooper faced "a multitude of challenges," ranging from hostility, chastisement, and even to assurances that WorldCom's allowances were proper).

86. Sarbanes-Oxley Act of 2002 § 1514A; *see also* Moberly, *supra* note 9, at 74–75 (finding that Congress placed an emphasis on breaking the "corporate code of silence" that discouraged whistleblowing in the workplace).

87. *See* Brite, *supra* note 73, at 1 (arguing that SOX has been effective, while others argue that it has "stymied companies, slowed economic growth, and inhibited the United States' emergence from this current recession").

88. *See* S. REP. NO. 107-146, at 6–10 (2002) (listing six shortcomings in the current law that Enron exposed).

89. Fred W. Alvarez, Elizabeth C. Tippett, Jeanna C. Steele & Michael J. Nader, *The Sarbanes-Oxley Act: Current Issues in Whistleblower Enforcement*, SP027 ALI-ABA 233, 238 (2009) (quoting President George W. Bush, Remarks by the President on Signing the Sarbanes-Oxley Action of 2002 (July 30, 2002), *available at* http://www.whitehouse.gov/news/releases/2002/07/20020730) (internal quotation marks omitted).

90. *See* Brite, *supra* note 73, at 2.

91. *Id.* at 1 (quoting Vanessa Walters, *Doing More Harm Than Good*, FIN. TIMES (2006)) (internal quotation marks omitted).

Either way, most employees face a steep "uphill battle" in finding protection under SOX.[92] Within the first three years after it was passed, SOX had a success rate of 3.6%.[93] The success rate can be attributed to procedural hurdles such as: (1) requiring employees to exhaust all administrative remedies with the Occupational Safety and Health Administration ("OSHA");[94] (2) requiring employees to file a claim within ninety days of retaliation; and (3) requiring appeals to be made within thirty days of an OSHA decision.[95] Furthermore, OSHA strictly enforces the statute of limitations[96] on SOX cases, and equitable arguments explaining the reason for late filings have generated little success.[97]

If an employee somehow manages to pass all the procedural hurdles, she is still left with proving the substance of the claim.[98] In order to successfully state a claim under § 1514A,[99] a plaintiff must allege that: "(1) she engaged in protected activity; (2) the employer knew that she engaged in the protected activity; (3) she suffered an unfavorable personnel action; and (4) the protected activity was a contributing factor in the unfavorable action."[100] With so many restrictions, SOX has one of the lowest employee-win ratios when compared to other whistleblower statutes.[101]

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92. Moberly, *supra* note 9, at 131 (footnote omitted) ("An employee who files a Sarbanes-Oxley claim faces a steeper uphill battle than most employees asserting claims against an employer under comparable employee statutes. Simply put, this study's results suggest that Sarbanes-Oxley does not protect employee whistleblowers to the extent Congress envisioned when it passed the Act.").

93. An employee is successful when she brings a timely claim, meets all the procedural requirements, and wins on her whistleblower claim under SOX. *See* Moberly, *supra* note 9, at 67 (finding that "491 employees filed Sarbanes-Oxley complaints with the Occupational Safety and Health Administration" and that "OSHA resolved 361 of these cases and found for employees only 13 times, a win rate of 3.6%").

94. Lucienne M. Hartmann, *Whistle While You Work: The Fairytale-Like Whistleblower Provisions of the Dodd-Frank Act and the Emergence of "Greedy," the Eighth Dwarf*, 62 MERCER L. REV. 1279, 1302–03 (2011).

95. *See* Moberly, *supra* note 9, at 100–03 (showing that 21% of cases failed under a procedural rationale).

96. S. REP. NO. 107-146, at 12 (2002).

97. *See* Moberly, *supra* note 9, at 107–08 (requiring that a report correspond to one of the four securities frauds listed in the statute).

98. *See* Moberly, *supra* note 9, at 76.

99. Sarbanes-Oxley Act of 2002 § 1514A.

100. Harp v. Charter Commc'ns, Inc., 558 F.3d 722, 723 (7th Cir. 2009).

101. *See* Moberly, *supra* note 9, at 93 tbl. 2.

III. WHISTLEBLOWER PROTECTION UNDER DODD-FRANK & *LAWSON V. FMR LLC*

A. Financial Crisis of 2008

SOX has also been criticized for failing to both provide enough protection to whistleblowers and prevent the financial crisis of 2008.[102] In September of 2008, Lehman Brothers filed for one of the largest US corporate bankruptcies in history.[103] With Lehman Brothers bankrupt, panic ensued, and public distrust of the financial institution led to a freeze on lending and spending.[104] To prevent Merrill Lynch from following a similar fate, Bank of America bought Merrill Lynch for $50 billion.[105] As conditions deteriorated, "[m]ajor banks, insurers, government-sponsored enterprises, and investment banks either failed or required hundreds of billions in federal support to continue functioning."[106] In response, the government used taxpayer dollars to bail out banks and the economy was left in the worst recession it had seen in eighty years.[107] This collapse left our financial system in disarray and millions of Americans unemployed.[108]

B. Significant Changes to SOX

After SOX failed to prevent the financial crisis of 2008,[109] Congress drafted the Dodd-Frank Wall Street Reform and Consumer Protection Act

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102. *See* Bishara et al., *supra* note 9, at 39 (footnotes omitted) (criticizing SOX for "its lack of extraterritorial reach, for being obtrusive, and for not playing a role in exposing the high-profile frauds that precipitated the financial crisis and recession of 2008").

103. James Quinn, *Lehman Brothers Files for Bankruptcy as Credit Crisis Bites*, THE TELEGRAPH (Sept. 15, 2008, 6:40 AM), http://www.telegraph.co.uk/finance/newsbysector/banksandfinance/4676621/Lehman-Brothers-files-for-bankruptcy-as-credit-crisis-bites.html, *archived at* http://perma.cc/9T9X-DSCU.

104. *See Crash Course: The Origins of the Financial Crisis*, THE ECONOMIST (Sept. 7, 2013), http://www.economist.com/news/schoolsbrief/21584534-effects-financial-crisis-are-still-being-felt-five-years-article, *archived at* http://perma.cc/UML2-Y9DT.

105. Quinn, *supra* note 103.

106. Nicole H. Sprinzen, Asadi v. GE Energy (USA) L.L.C.*: A Case Study of the Limits of Dodd-Frank Anti-Retaliation Protections and the Impact on Corporate Compliance Objectives*, 51 AM. CRIM. L. REV. 151, 160 (2014) (quoting BAIRD WEBEL, CONG. RESEARCH SERV., R41350, THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT: ISSUES AND SUMMARY, at summary (2010), *available at* http://www.llsdc.org/assets/DoddFrankdocs/crs-r41350.pdf) (internal quotation marks omitted).

107. *See id.* at 159; *Crash Course: The Origins of the Financial Crisis*, *supra* note 104.

108. *Wall Street Reform: The Dodd-Frank Act*, THE WHITE HOUSE, https://www.whitehouse.gov/economy/middle-class/dodd-frank-wall-street-reform (last visited Feb. 3, 2016), *archived at* http://perma.cc/Y6CB-8PGQ.

109. Carozza, *supra* note 67 (noting parallels between the events leading to the financial crisis of 2008 and Enron and WorldCom). Both involved "excessive risk-taking, massive market bubbles, and

of 2010 ("Dodd-Frank"), which was signed into law on July 21, 2010, by President Obama.[110] At its root, the financial crisis of 2008 can be attributed to a lack of oversight and regulation of banks and mortgage companies.[111] Therefore, the purpose of enacting Dodd-Frank, similar to the purpose of enacting SOX, was to "promote the financial stability of the United States by improving accountability and transparency in the financial system."[112] Dodd-Frank instituted "sweeping financial reform in the United States" and made significant changes to SOX.[113] For example, Dodd-Frank expanded the limited coverage of whistleblower protection under SOX to a public company's subsidiaries or affiliates.[114] In addition, Dodd-Frank made the aforementioned procedural hurdles[115] less challenging by giving whistleblowers 180 days to file a claim.[116] Dodd-Frank also added a right to a jury trial and made arbitration agreements unenforceable.[117] These amendments specifically targeted and enhanced SOX's whistleblower provisions—clearly illustrating Congress's intent in making whistleblower protection more effective.[118]

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inadequate regulations to protect investors and consumers." *Id.*

110. 15 U.S.C. § 78u-6 (2014); Jessica Luhrs, Note, *Encouraging Litigation: Why Dodd-Frank Goes Too Far in Eliminating the Procedural Difficulties in Sarbanes-Oxley*, 8 HASTINGS BUS. L.J. 175, 175 (2012).

111. SOX, in theory, was supposed to prevent such a crisis by increasing oversight and internal control and supervision of public companies. *See Wall Street Reform: The Dodd-Frank Act*, *supra* note 108.

112. *See* Murray v. UBS Sec., LLC, No. 12 Civ. 5914(KPF), 2014 WL 285093, at *8 (S.D.N.Y. Jan. 27, 2014) (citing Pub. L. No. 111-203, 124 Stat 1376 (2010)).

113. Megan Foscaldi, Recent Development, *Whistleblower Provisions of the Dodd-Frank Act*, 31 REV. BANKING & FIN. L. 486, 487 (2012); *see also* Dave Ebersole, Note, *Blowing the Whistle on the Dodd-Frank Whistleblower Provisions*, 6 OHIO ST. ENTREPRENEURIAL BUS. L.J. 123, 124 (2011); Luhrs, *supra* note 110, at 181 (noting that Dodd-Frank enlarged coverage to whistleblowers).

114. Foscaldi, *supra* note 113, at 489 ("By explicitly expanding the class of persons eligible for protection under the whistleblower provisions to include employees of subsidiaries and affiliates of public companies, the Dodd-Frank Act's whistleblower provisions resolved a major loophole under which whistleblowers seeking protection under SOX were denied for not being 'covered employees.'").

115. *See supra* notes 94–97 and accompanying text.

116. Foscaldi, *supra* note 113, at 489 (giving whistleblowers double the amount of time to file a claim under Dodd-Frank as compared to under SOX).

117. Luhrs, *supra* note 110, at 180–81 (noting that Dodd-Frank "mark[ed] a significant departure from the original Sarbanes-Oxley rules").

118. *See infra* Part VI.

C. Dodd-Frank's Own Set of Problems

Despite these amendments, Dodd-Frank is still criticized for over-incentivizing whistleblowing[119] and inadvertently minimizing the need for internal reporting.[120] Each concern is briefly explained below.

First, Dodd-Frank is criticized for encouraging whistleblowing. One of the biggest amendments to SOX is the addition of bounty provisions.[121] These bounty provisions incentivize employees with knowledge of corporate wrongdoing to report to the SEC in return for monetary rewards.[122] This emphasis on incentives has raised concerns of frivolous claims and of employees reporting violations of corporate fraud out of pure greed.[123]

Furthermore, by encouraging whistleblowers to report fraud to the SEC, Dodd-Frank inadvertently "decreases the effectiveness of compliance programs by reducing the number of employees willing to utilize internal reporting mechanisms."[124] In doing so, Dodd-Frank creates friction between corporations and the federal government as both entities compete for employee disclosures.[125] In summary, through the use of bounty provisions, Dodd-Frank arguably undermines one of the many goals of SOX: to encourage employees to report violations of fraud internally within public companies.[126]

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119. *See infra* note 122 and accompanying text.

120. *See infra* note 124 and accompanying text.

121. *See* Hartmann, *supra* note 94, at 1285 (quoting Geoffrey Christopher Rapp, *Beyond Protection: Invigorating Incentives for Sarbanes-Oxley Corporate and Securities Fraud Whistleblowers*, 87 B.U. L. REV. 91, 113–14 (2007)) (internal quotation marks omitted) (noting that SOX did not provide any true incentive to blow the whistle and therefore only "sealed cracks in the doctrine" rather than offering "radical reform").

122. CRAIN, KIM & SELMI, *supra* note 18, at 521–22.

123. *See* Hartmann, *supra* note 94, at 1313 (concerned with "creating a facet of society driven by green and the potential for quick wealth"). *Compare* Hartmann, *supra* note 94, at 1306 (discussing the possibility of frivolous claims), *with* Bishara et al., *supra* note 9, at 62 (noting that in 2012, the Commission had received 3001 whistleblower tips from all fifty states and that the program had proven to be valuable).

124. *See* Quigley, *supra* note 80, at 269.

125. *Id.* at 271 (discussing the tug-of-war notion between companies and the government).

126. *See id.* at 257. *Contra* Hartmann, *supra* note 94, at 1296 (noting that "the Dodd-Frank Act does not completely usurp Sarbanes-Oxley's administrative process; rather, it creates an entirely new and separate enforcement mechanism for retaliation claims that parallels the existing regime under Sarbanes-Oxley").

D. Lawson v. FMR LLC *(2014)*

While Congress tried to improve the whistleblower protections provided in SOX through further legislation, the Supreme Court also tried to do so by providing lower courts with further guidance on the proper interpretation of SOX in *Lawson v. FMR LLC.*[127]

In 2014, Lawson, an employee of a private company that contracted with FMR, sought protection under SOX after being retaliated against for raising concerns regarding the overstated expenses associated with operating mutual funds.[128] *Lawson* is a great example of how the statutory language of SOX can give rise to different interpretations of who is protected under the law.[129] In that case, the main issue was whether § 1514A applies to employees of privately held contractors and subcontractors who perform work for a public company.[130]

Justice Ginsburg, who delivered the opinion of the Court, stated that Congress, in structuring SOX, "recognized that outside professionals—accountants, law firms, contractors, agents, and the like—were complicit in, if not integral to, the shareholder fraud and subsequent cover-up [of Enron]."[131] She further stated that "outside professionals bear significant responsibility for reporting fraud by the public companies with whom they contract, and that fear of retaliation was the primary deterrent to such reporting by the employees of Enron's contractors."[132] Outside professionals, in this sense, act as "gatekeepers" and are vital to spotting corporate fraud.[133] By examining the congressional intent behind SOX, the

127. Lawson v. FMR LLC, 134 S. Ct. 1158, 1164 (2014).

128. *Id.*

129. *See* Spinner v. David Landau & Assocs., LLC, ARB Nos. 10-111, 10-115, ALJ No. 2010-SOX-029, 2012 WL 1999677, at *8 (Dep't of Labor May 31, 2012) (noting how "the statute's lack of definition of 'employee' leaves the text open to competing problematic interpretations"); *see also* McCarthy, *supra* note 12, at 159 (noting that Congress, in its debate, did not examine this specific question, and that this lack of clarity is "likely a result of the haste with which SOX was passed").

130. *Lawson*, 134 S. Ct. at 1161.

131. *Id.* at 1169; *Spinner*, 2012 WL 1999677, at *12–13; *see also* S. REP. NO. 107-146, at 4 (2002); CRAIN, KIM & SELMI, *supra* note 18, at 509 (stating that the majority believed that professional obligations by accountants and lawyers to blow the whistle without any protection would be insufficient incentives to blow the whistle).

132. *Lawson*, 134 S. Ct. at 1170. In addressing the dissent's concern, Ginsburg found supporters of the dissenting view had failed to identify a single case "in which the employee of a private contractor ha[d] asserted a § 1514A claim based on allegations unrelated to shareholder fraud." *Id.* at 1172. Furthermore, she noted that if the Court were somehow wrong in regards to interpreting the intent of Congress, then Congress could easily fix the problem by amending the statute. *Id.* at 1173.

133. *See id.* at 1170 (quoting S. REP. NO. 107-146, at 20–21 (2002)) (noting that a Senate report on the subject "emphasiz[ed] the importance of outside professionals as 'gatekeepers who detect and deter fraud'"); S. REP. NO. 107-146, at 5 (2002) (giving two examples of whistleblower retaliation that involved outside professionals).

Court held that SOX worked to dismantle any incentive to remain silent in the corporate setting.[134]

Although *Lawson* extends coverage to private contractors of public companies and Dodd-Frank expands the remedies available under SOX, neither addresses whether an employee discharging her duties is covered under SOX.[135] However, both *Lawson* and Dodd-Frank support the argument that SOX be read broadly, in light of its purpose, to extend coverage to employees discharging their duties.[136]

IV. EMERGING SPLIT AT THE DISTRICT COURT LEVEL

In the past few years, three district court cases[137] and one Administrative Review Board ("ARB")[138] decision have briefly addressed the issue of whether SOX covers employees discharging their duties. All four cases, discussed below, dispense with this issue rather quickly and instead turn their attention to the actual elements of the claim.[139]

A. No Protection to Employees Discharging Their Duties

In *Riddle v. First Tennessee Bank*, plaintiff-employee Riddle was terminated for what he believed constituted protected activity under Section 806 of SOX.[140] Plaintiff alleged that he should be protected

134. *Lawson*, 134 S. Ct. at 1170; S. REP. NO. 107-146, at 20-21 (2002); *see also* Jennifer Farer, *Who Is Protected by the Sarbanes-Oxley and Dodd-Frank Whistleblower Anti-Retaliation Provisions? The Supreme Court and SEC Weigh In*, MCGUIREWOODS (Mar. 10, 2014), http://www.subjecttoinquiry.com/sec/who-is-protected-by-the-sarbanes-oxley-and-dodd-frank-whistleblower-anti-retaliation-provisions-the-supreme-court-and-sec-weigh-in/, *archived at* https://perma.cc/EM4G-3CQT (stating that the Supreme Court favored a broader reading that extends to contractors because the text and structure of parallel statutes and the purpose of enacting SOX favored such an interpretation).

135. Although Congress has been silent on whether SOX extends coverage to employees discharging their duties, one cannot automatically interpret congressional intent from congressional silence. Also, the impact of discharging one's duties on protection available for the employee from employer retaliation has been previously addressed under both *Garcetti* and the WPA. *See supra* Part I.

136. *See infra* Part VI.

137. Riddle v. First Tenn. Bank, No. 3:10-cv-0578, 2011 WL 4348298, at *1–2 (M.D. Tenn. Sept. 16, 2011); Barker v. UBS AG, 888 F. Supp. 2d 291, 302 (D. Conn 2012); Yang v. Navigators Grp., Inc., 18 F. Supp. 3d 519, 522 (S.D.N.Y. 2014).

138. Robinson v. Morgan Stanley, ARB No. 07-070, ALJ No. 2005-SOX-044, 2010 WL 348303, at *9 (Dep't of Labor Jan. 10, 2010).

139. *See* Vodopia v. Koninklijke Philips Elecs., N.V., 398 F. App'x 659, 662 (2d. Cir. 2010) (holding that plaintiff must demonstrate, by a preponderance of the evidence, four elements: "(1) that he engaged in protected activity, (2) the employer knew of the protected activity, (3) he suffered an unfavorable personnel action, and (4) circumstances exist to suggest that the protected activity was a contributing factor to the unfavorable action").

140. *Riddle*, 2011 WL 4348298, at *1–2.

because he reported what he believed to be a violation of the Bank Bribery Act.[141] Furthermore, he alleged that he continued to protest against his employer's refusal to report the purported violation and carried out further investigations of his own.[142] The court held that plaintiff's actions did not constitute protected activity because he failed to "step outside his role" as an investigator.[143] In this case, the court found that although plaintiff "threaten[ed] to step outside his role . . . he *never* d[id]. He merely report[ed] the alleged violation to three individuals within the company . . . while in his role as an investigator."[144]

After addressing this first issue, the court focused its analysis primarily on whether plaintiff reasonably believed that the violation he reported constituted protected activity under SOX.[145] In order to constitute protected activity, "a plaintiff must prove that the cited conduct 'definitively and specifically' relates to one of the classes of laws listed in [SOX]."[146] Plaintiff, though alleging a violation of the Bank Bribery Act, failed to show that a reasonable person in his position would have found the purported violations to constitute shareholder fraud.[147]

B. Protection to Employees Discharging Their Duties

Unlike *Riddle v. First Tennessee Bank*, which did not provide protection for an employee discharging his duty, the ARB in *Robinson v. Stanley* concluded that "[SOX] does not indicate that an employee's report or complaint about a potential violation must involve actions outside the complainant's assigned duties."[148] The provisions of SOX merely state that no employer "may discharge, demote, suspend, threaten, harass, or in

141. *Id.* at *7 (noting, however, that the defendant alleged it fired plaintiff "for a string of performance failures and lack of judgment he routinely exhibited in conducting his investigations and his dealing with other employees").

142. *Id.* at *3–4.

143. *Id.* at *7.

144. *Id.* at *8.

145. *Id.*

146. *Id.* at *6 (quoting Welch v. Chao, 536 F.3d 269, 276–77 (4th Cir. 2008)) (holding that reasonable belief is enough to constitute protected activity as long as the reasonable belief is based specifically on one of the six categories of law that SOX provides protection for).

147. *Id.* at *9. Even if plaintiff Riddle had proven that his actions constituted protected activity, the court noted that defendant's motion for summary judgment would still be granted because the defendant showed "by clear and convincing evidence it would have terminated Plaintiff regardless of his alleged protected activity." *Id.*

148. Robinson v. Morgan Stanley, ARB No. 07-070, ALJ No. 2005-SOX-044, 2010 WL 348303, at *8 (Dep't of Labor Jan. 10, 2010).

any other manner discriminate against an employee[149] in the terms and conditions of employment."[150] The plain text of the statute does not distinguish types of employees covered under SOX. The ARB, therefore, saw no need to distinguish the plaintiff as a certain type of employee and instead turned its attention to determining whether Robinson had "directly implicate[d] the categories of fraud or securities violations listed in the statute," and then focused on the causation element.[151] The ARB held that Robinson failed to prove that "her protected activity was a contributing factor in the decision to discharge her" and dismissed her complaint.[152] In the following four years, two district courts deferred to the ARB's holding in *Robinson*.

In 2012, the US District Court for the District of Connecticut extended coverage to an employee discharging his duty in *Barker v. UBS AG, LLC*.[153] The court found the defendant's reliance on *Riddle* unavailing and instead held that construing whistleblower protection broadly was reasonable in light of the purposes underlying SOX.[154]

In 2014, the US District Court for the Southern District of New York, in *Yang v. Navigators Group, Inc.*, held that SOX provided protection for plaintiff-employee Yang when she reported what she reasonably believed to be a securities law violation.[155] Although the defendant argued that plaintiff Yang's reports were "part and parcel of her job," the court rejected this argument and instead focused on plaintiff Yang's reasonable belief that a violation under SOX had occurred—based on her training and experience rather than her job duties.[156]

The holdings in the latter three cases are premised on the idea that SOX was enacted to encourage the reporting of specific types of corporate fraud, regardless of an employee's professional duty. These three cases demonstrate that not only is inquiring into an employee's job duties

149. *Contra* 12 U.S.C. § 1790b(a)(1) (2014) (using the term "any" instead of "an" employee in its whistleblower statute).

150. Sarbanes-Oxley Act of 2002 § 1514A.

151. *Robinson*, 2010 WL 348303, at *1 (noting that in order for plaintiff to be successful in claiming whistleblower protection under SOX, a plaintiff must show that her actions constituted protected activity and that her actions were a contributing factor in the employer's retaliation).

152. *Id.*

153. Barker v. UBS AG, 888 F. Supp. 2d 291, 302 (D. Conn. 2012).

154. *Id.* at 297; *see also, e.g.*, Mahony v. KeySpan Corp., No. 04 CV 554 SJ, 2007 WL 805813, at *5 (E.D.N.Y Mar. 12, 2007) ("Given that SOX is a statute designed to promote corporate ethics by protecting whistleblowers from retaliation, it is reasonable to construe the statute broadly.").

155. Yang v. Navigators Grp., Inc., 18 F. Supp. 3d 519, 522 (S.D.N.Y. 2014).

156. *Id.* at 530.

inconsequential, but also distracting—diverting the analysis away from the main purpose behind enacting SOX.

V. ANALYSIS

There is a social stigma associated with whistleblowing.[157] Many perceive whistleblowers as reporting wrongdoing to benefit themselves or to harm others.[158] This mentality can prevent the general public, including the legislature, from realizing society's interest in promoting disclosures of wrongdoing within an organization.[159] In their article, *The Mouth of Truth*, Norman D. Bishara, Elletta Sangrey Callahan, and Terry Morehead Dworkin point out that promoting whistleblowing has been ineffective due to "statutory characteristics, judicial interpretations, and the complex nature of the interaction among whistleblower claims."[160]

Each of the authors' reasons why whistleblowing regulations have been ineffective are demonstrated in this Note. For instance, the ineffectiveness of whistleblowing is exemplified in SOX where the statutory language is unavailing,[161] where there is a split in interpreting the coverage afforded by SOX to different types of employees among the courts,[162] and where the purpose of enacting SOX is overshadowed by the unnecessary focus placed on an employee's job responsibilities.[163] In addition, judicial interpretation of employees discharging their duties under the WPA is "incompatible [overall] with the policies behind whistleblower protection statutes" and incompatible with SOX.[164] In order to avoid these types of problems and to promote effective whistleblowing, it is paramount to observe the factors that motivate individuals to report violations,[165]

157. S. REP. NO. 107-146, at 19 (2002) (noting that companies punish whistleblowers because whistleblowing is seen as a disloyal act).

158. *See generally* Hartmann, *supra* note 94; Bishara et al., *supra* note 9, at 95 (associating derogatory terms such as "tattletales" or "snitches" with whistleblowers).

159. *See* Bishara et al., *supra* note 9, at 39 (stating that whistleblowing is as an "important source of information vital to honest government, the enforcement of laws, and the protection of the public health and safety").

160. *See* Bishara et al., *supra* note 9, at 56.

161. *See infra* note 187 and accompanying text.

162. *See supra* Part IV.

163. *See supra* Part IV.B.

164. Modesitt, *supra* note 4, at 180.

165. *See* Bishara et al., *supra* note 9, at 60 (footnote omitted) ("Three key factors motivat[ing] [whistleblowers are]: confidence that the report would effectively address the misconduct at issue; belief that the organization supported whistleblowing, in general; and the seriousness of the malfeasance. Whistleblowers are also motivated by the desire to put 'their' organization back on the right track.").

Congress's purpose in enacting the statute,[166] and other federal whistleblower statutes to help guide in the interpretation of the law.[167]

To illustrate, in *Lawson*, the Supreme Court looked to the text and structure of the Aviation Investment and Reform Act ("Air 21"), a parallel statute, to better understand how to interpret SOX.[168] This Subpart follows a similar approach by looking at the WPA, its case law, and Congress's response in 2014.

To review, the statutory language of the WPA protects any disclosure of information by an employee.[169] However, under *Willis* and *Huffman*, the Federal Circuit held that the WPA does not extend coverage to employees merely carrying out their job responsibilities.[170] In 2012, Congress amended the WPA and strengthened whistleblower protection to federal whistleblowers.[171] Most notably, Congress added subsection (f), which does not exclude an employee from whistleblower protection simply because the report occurs during the normal course of her duties.[172]

Prior to this amendment, most courts followed *Garcetti*, which scrutinized an employee's job duties as an initial threshold requirement.[173] The *Garcetti* threshold, as noted by Julian W. Kleinbrodt,[174] shifted the focus "from the content of the speech to the role of the speaker" and assumed that the government employer's interest in workplace efficiency always outweighed an employee's speech made pursuant to his job

166. *See supra* notes 70–74 and accompanying text.

167. *See* Bishara et al., *supra* note 9, at 83 (arguing that improving the harmony between whistleblowing laws has the potential to increase their effectiveness).

168. Lawson v. FMR LLC, 134 S. Ct. 1158, 1164 (2014). This tactic is necessary because Congress, when enacting SOX, "track[ed] . . . as closely as possible" the protections afforded by Air 21's whistleblower protection provision. *Id.* at 1175 (quoting S. REP. NO. 107-146, at 30 (2002) ("Because we had already extended whistleblower protections to non civil service employees, we thought it best to track those protections as closely as possible.")). *Compare* 18 U.S.C. § 1514A(a) (2002) ("No [public] company . . . or any officer, employee, contractor, subcontractor, or agent of such company may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment . . . ."), *with* 49 U.S.C. § 42121(a) (2002) ("No air carrier or contractor or subcontractor of an air carrier may discharge an employee or otherwise discriminate against an employee with respect to compensation, terms, conditions, or privileges of employment . . . .").

169. *See supra* note 36 and accompanying text.

170. *See supra* Part I.C–D.

171. Jason Zuckerman, *Congress Strengthens Whistleblower Protections for Federal Employees*, LEL FLASH (Section on Labor & Emp't, Am. Bar Ass'n, Chicago, IL), Nov./Dec. 2012 (noting that "President Obama signed into law the Whistleblower Protection Enhancement Act of 2012," which amended and strengthened the whistleblower protection provided by the WPA).

172. 5 U.S.C. § 2302(f)(2) (2014) (stating that protection is not excluded simply because an employee's disclosure is made during the normal course of her duties).

173. *See supra* note 29 and accompanying text.

174. Julian W. Kleinbrodt, Note, *Pro-Whistleblower Reform in the Post-*Garcetti *Era*, 112 MICH. L. REV. 111, 119 (2013).

duties.[175] It is not surprising, then, that *Garcetti*, *Willis*, and *Huffman* did not extend protection to employees merely discharging their duties, as all three cases focused on protecting the employer, who wears two hats—"employer and sovereign."[176]

However, by amending the WPA, Congress made "crystal clear its intent that *any* whistleblower who reports misconduct via one of the enumerated channels be protected under federal whistleblower statutes."[177] This not only overruled the need to address whether a report concerning a potential violation arose out of an employee's job responsibilities, but shifted the focus correctly back to the content of an employee's speech.[178] Therefore, one argument for extending coverage to employees discharging their duties is that even its predecessor, the WPA, moved away from the *Garcetti* threshold and dispensed with this issue.

Even if one does not find the first argument persuasive, courts should still hold that SOX extends coverage to employees discharging their duties because the ways in which SOX is distinguishable from general whistleblower statutes[179] only augments the need for broader whistleblower protection.[180] SOX is notably different because the concerns of an employer playing a dual role are not present as SOX protects employees of publicly traded companies.[181] In addition, the purpose of SOX is hindered if courts interpreting SOX adopt the *Garcetti* approach to employees discharging their duties. The rest of this Note highlights these differences and states five arguments in favor of following the holding in *Yang* and extending coverage to employees discharging their duties.[182]

VI. PROPOSAL

Congress has the prerogative to fashion statutes as it sees fit.[183] Section 1514A begins by stating that SOX provides "[w]histleblower protection

175. *Id.*

176. *Id.* at 112.

177. Leshinsky v. Telvent GIT, S.A., 942 F. Supp. 2d 432, 449 (S.D.N.Y. 2013).

178. *See supra* note 174 and accompanying text.

179. *See generally* CRAIN, KIM & SELMI, *supra* note 18, at 498–501 (noting that SOX and Dodd-Frank are specific corporate whistleblower statutes that are unlike other general whistleblower statutes as they protect only certain types of employees for reporting certain types of information); *see also* Bishara et al., *supra* note 9, at 44 (discussing adjunct versus core statutes).

180. *See, e.g.*, *supra* note 154 and accompanying text.

181. Sarbanes-Oxley Act of 2002 § 1514A.

182. All five of the arguments below derive from observing the history of whistleblower protection. Particularly, analyzing the WPA, Dodd-Frank, and *Lawson* in light of the purposes of enacting SOX supports extending coverage to employees discharging their duties.

183. *See* Morante-Navarro v. T&Y Pine Straw, Inc., 350 F.3d 1163, 1167 (11th Cir. 2003) (noting

for employees of publicly traded companies."[184] It continues to state that no employer "may discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment."[185] This is the full extent of the language used to clarify the type of employee protected under SOX.[186] The statutory language of SOX alone is unavailing and does not help in defining the term "employee."[187] This vagueness has led to different interpretations of the same language by courts.[188] However, these different interpretations do not automatically render SOX ambiguous.[189] On the contrary, a careful examination of the policy reasons and objectives behind enacting SOX[190] supports five arguments for following the holding in *Yang* and extending coverage to employees discharging their duties.[191]

First of all, SOX should extend coverage to employees discharging their duties because its predecessor, the WPA, moved away from distinguishing employees on this very basis when Congress amended subsection (f) of the WPA.[192] The WPA is a great starting point because it is also a federal whistleblower statute that has struggled with this issue and can shed some light on how courts have dealt with and interpreted its whistleblower protection provisions.[193]

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the importance of giving deference to Congress's intent).

184. Sarbanes-Oxley Act of 2002 § 1514A.

185. *Id. Contra* 12 U.S.C. § 1790b(a)(1) (2014) (using the term "any" instead of "an" employee in its whistleblower statute).

186. Spinner v. David Landau & Assocs., LLC, ARB Nos. 10-111, 10-115, ALJ No. 2010-SOX-029, 2012 WL 1999677, at *15 (Dep't of Labor May 31, 2012) (stating that "Congress could easily have limited [coverage] simply by statutorily defining the term 'employee,'" but for some reason did not limit or restrict the term "employee").

187. *Contra* Balko v. Ukrainian Nat'l Fed. Credit Union, No. 13 Civ. 1333(LAK)(AJP), 2014 WL 1377580, at *10 (S.D.N.Y. Mar. 28, 2014); 12 U.S.C. § 1790b(a)(1) (defining the scope of coverage by extending protection to all employees unless they "deliberately cause[d] or participate[d] in the alleged violation . . . or knowingly or recklessly provide[d] substantially false information").

188. The Supreme Court has not addressed whether SOX extends coverage to employees discharging their duties. District court holdings are only persuasive and not mandatory. *See, e.g.*, Englehart v. Career Educ. Corp., No. 8:14-cv-444-T-33EAJ, 2014 U.S. Dist. LEXIS 64994, at *10, *20 (M.D. Fla. May 12, 2014) (noting that the Fifth Circuit declined to follow the conclusion of several district courts).

189. *Id.* at *20.

190. *See* S. REP. NO. 107-146, at 1 (2002) (Section I). The Senate Report is arguably one of the clearest expressions of Congress's intent while drafting SOX.

191. Crandon v. United States, 494 U.S. 152, 158 (1990) (finding it proper to fully understand the meaning of the statute by looking "not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy"); *see also* Huffman v. Office of Pers. Mgmt., 263 F.3d 1341, 1352 (Fed. Cir. 2001) (holding that it was appropriate to "interpret the statute in light of its central purpose").

192. *See* 5 U.S.C. § 2302(f)(2) (2014).

193. *Huffman*, 263 F.3d at 1351–52. Even though there seems to be a consistent notion of not

In both *Willis* and *Huffman*, the Federal Circuit declined to extend whistleblower protection to employees discharging their duties.[194] One reason for this was a strong notion that an employee had a fiduciary obligation to his employer and that extending coverage to employees merely carrying out this obligation would interfere with "subjecting employees to normal, non-retaliatory discipline."[195] This notion was also embodied in *Garcetti*, which stated that an employer's interest always outweighs the employee's interest when the employee speaks pursuant to his or her job duties.[196] By amending the WPA, however, Congress made its intent clear.[197] Instead of focusing on the chance that employees would take advantage of whistleblower protection, Congress focused on the purpose of enacting the WPA, which was to protect federal whistleblowers from employer retaliation.[198] Similarly, SOX should also move away from *Garcetti* and extend coverage to employees that are discharging their duties to fully enact the purpose Congress had in mind when drafting SOX—to prevent future corporate fraud by making public companies more transparent through the utilization of whistleblowers.

Second, SOX is different from the WPA in a way that strengthens the argument for extending protection to employees discharging their duties.[199] The WPA's main goal is to "encourage reporting of a 'genuine violation of law' rather than 'minor or inadvertent miscues occurring in the conscientious carrying out of a federal official or employee's assigned duties.'"[200] In contrast, SOX, though narrow in scope, is "intentionally

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extending coverage, the court here admits that its "jurisprudence on the normal duties question has not always been clear, and it is possible to find conflicting statements in dictum concerning the normal duties issue." *Id.*

194. Willis v. Dep't of Agric., 141 F.3d 1139, 1145 (Fed. Cir. 1998); *Huffman*, 263 F.3d at 1342.

195. *Huffman*, 263 F.3d at 1352. The court is concerned that extending coverage will cause employees to use whistleblowing as an escape route to avoid adverse action when they perform poorly in their normal work obligations. *Id.*

196. *See* Kleinbrodt, *supra* note 174, at 119.

197. Leshinsky v. Telvent GIT, S.A., 942 F. Supp. 2d 432, 449 (S.D.N.Y. 2013) ("In rejecting the Federal Circuit's narrow reading of the WPA, Congress made crystal clear its intent that *any* whistleblower who reports misconduct via one of the enumerated channels be protected under federal whistleblower statutes.").

198. *Id.*; *see also* Marques v. Fitzgerald, 99 F.3d 1, 6 (1st Cir. 1996) (finding that there is "no significant policy served by extending whistle-blower protection only to those who carry a complaint beyond the institutional wall, [yet] denying it to the employee who seeks to improve operations from within the organization").

199. CRAIN, KIM & SELMI, *supra* note 18, at 498 (noting that SOX is meant to protect only specific kinds of corporate fraud).

200. Langer v. Dep't of the Treasury, 265 F.3d 1259, 1266 (Fed. Cir. 2001) (quoting Herman v. Dep't of Justice, 193 F.3d 1375, 1381 (Fed. Cir. 1999)); *see also* Huffman v. Office of Pers. Mgmt., 263 F.3d 1341, 1354 (Fed. Cir. 2001) (finding that reports outside of normal channels are disclosures

written to sweep broadly, protecting any employee of a publicly traded company who took such reasonable action to try to protect investors and the market."[201] The fundamental difference between the WPA and SOX lies in the consequences that stem from whistleblowing.[202]

Stated differently, the magnitude of an unreported violation under SOX is greater than that of the WPA. As seen in *Willis*,[203] the impact of reporting violations of conservation plans for sixteen farms did not lead to the collapse of the Department of Agriculture. In contrast, the impact a whistleblower can have by reporting securities fraud violations is drastic. This is not to say that reports of violations under the WPA are less important than SOX. Instead, violations under SOX are more time sensitive and require immediate attention and public exposure.[204] If one of Enron's employees had come forward with the extensive accounting improprieties to the public, the outcome could have potentially saved billions of dollars and prevented the collapse of Enron.[205] The harmful and devastating impact that could occur from an unreported securities violation further supports a more liberal interpretation of the coverage extended to employees discharging their duties. The focus, therefore, needs to remain "on whether the employee reported conduct that he or she reasonably believes constituted a violation of federal law."[206]

Third, extending protection to employees discharging their duties is the most logical way to safeguard investors and the public from future

protected under the WPA, but that reports of wrongdoing within the normal course of one's duties are not protected).

201. 149 CONG. REC. S1725-01, S1725, 2003 WL 193278 (Jan. 29, 2003); *see also* Mahony v. KeySpan Corp., No. 04 CV 554 SJ, 2007 WL 805813, at *1, *5 (E.D.N.Y. Mar. 12, 2007) (holding it reasonable to construe SOX broadly); *Enron Whistleblower Tells of 'Crooked Company,' supra* note 84 (quoting former Enron managing director Vince Kaminski who "felt the company was threatened and . . . had a duty to speak up").

202. Because SOX deals directly with publicly traded companies, the effect that a whistleblower can have on the financial markets is immeasurable. *See* S. REP. NO. 107-146, at 4 (2002) (pointing out that Enron was one example of numerous other cases where corporate fraud left the public in disarray).

203. Willis v. Dep't of Agric., 141 F.3d 1139, 1139 (Fed. Cir. 1998).

204 Violations under SOX go more to timing and society's imminent need to know about corporate fraud. *See* S. REP. NO. 107-146, at 3 (2002) ("Enron's sudden collapse left thousands of investors holding virtually worthless stock . . . .").

205. *See* S. REP. NO. 107-146, at 4 (2002). There is an undeniable need to protect those that report corporate fraud because of the particular vulnerability that corporate fraud places on the public. Firefighters and teachers, for example, have no way of being aware of the fraud occurring in these companies, and in turn have no means of protecting themselves from losing significant investments without the help of whistleblowers. *See id.*; *see also supra* note 84 and accompanying text.

206. Leshinsky v. Telvent GIT, S.A., 942 F. Supp. 2d 432, 443 (S.D.N.Y. 2013) (quoting Sylvester v. Parexel Int'l LLC, ARB No. 07-123, ALJ Nos. 2007-SOX-039, 2007-SOX-042 (Dep't of Labor May 25, 2011)) (internal quotation marks omitted).

harm.[207] In a committee hearing, experts warned Congress "that there are more 'Enrons' lurking out there, simply eluding discovery."[208] If Enron could hide massive amounts of debt from the public for four years,[209] it is absurd to think that Enron's employees, who are not hired as accountants or auditors, would be able to notice accounting irregularities that are so intricately designed and hidden.[210] It is therefore essential to rely on whistleblowers[211] from within the company who are hired as experts in accounting and auditing because they are in the best position to spot corporate fraud.[212] If, however, employees discharging their duties are not protected, securities violations are likely to go unreported and undetected.[213]

By declining to provide protection to employees discharging their duties, the statute is effectively rendered useless.[214] SOX is already tailored narrowly and has failed to protect many whistleblowers due to its procedural and substantive hurdles.[215] Further limiting the coverage provided to whistleblowers under SOX only undermines Congress's

207. *See* S. REP. NO. 107-146, at 2-3 (2002) (stating that the public was not savvy to the inner workings of Enron as Enron and its auditors spun "an intricate spider's web of deceit" that "successfully deceived the investing public and reaped millions for some select few insiders").

208. *Id.* at 11.

209. *Id.* at 3.

210. Even when Enron's former head of risk and research, Vince Kaminski, reported his concerns to upper management, he was not taken seriously. *See Enron Whistleblower Tells of 'Crooked Company,' supra* note 84 (describing how the defense attorney of Kenneth Lay, Enron's CEO, questioned Kaminski's competence on cross-examination and got him to acknowledge that he is not an accountant or an accounting expert).

211. *See* S. REP. NO. 107-146, at 10 (2002) (realizing that whistleblowers "are the only firsthand witnesses to the fraud" in complex fraud prosecutions).

212. *Id.* at 2. In its Senate Report, Congress stated that "[t]he alleged activity Enron used to mislead investors was not the work of novices." *Id.* Therefore, it is crucial to rely on expert accountants and auditors that are hired from within the company to spot and report corporate fraud. *See* Bishara et al., *supra* note 9, at 37 (noting that the intent of whistleblowing is not to focus on whether an employee learned of fraud during the course of his duties, but rather the intent lies in exposing, curtailing, and deterring misconduct through self-reporting and self-monitoring).

213. *See* Bishara et al., *supra* note 9, at 60 (noting that employees were motivated to blow the whistle if they were confident that the report would be addressed and that the organization would support and protect the employees who reported such violations); *see also* S. REP. NO. 107-146, at 11 (2002) (noting that "one in two Americans . . . depend on the transparency and integrity of our public markets").

214. *See* Bishara et al., *supra* note 9, at 48–49 (stating that SOX was criticized for not providing enough protection for whistleblowers); *see also* Banick, *supra* note 1, at 1899 (arguing that it is "improbable that . . . an employee would encounter wrongdoing 'outside the scope' of his or her job as the duties explicitly entail monitoring and reporting such wrongdoing—which leaves the argument that *any* wrongdoing discovered is always within the scope of his or her duties").

215. *See* Bishara et al., *supra* note 9, at 48–49; Moberly, *supra* note 9, at 100–03.

intent.[216] In fact, a major component of SOX focuses on internal reporting,[217] which cannot be enforced if employees can only seek protection by stepping outside their role and reporting to external sources.[218]

Fourth, coverage should extend to employees discharging their duties because Dodd-Frank supports such a reading. As a matter of fact, most of the amendments to Dodd-Frank evince Congress's intent to broaden whistleblower protection under SOX. For example, Congress expanded protection by explicitly including a public company's subsidiaries and affiliates.[219] Congress also addressed the procedural hurdles in SOX by doubling the amount of time whistleblowers had to bring a claim.[220] Furthermore, Dodd-Frank prevents employers from upholding pre-dispute arbitration agreements and grants whistleblowers a right to trial by jury.[221] The overall intent of Congress is to broaden whistleblower protection, which, in this case, is best furthered by following the holding in *Yang* and extending protection to employees discharging their duties.

Last but not least, SOX should extend coverage to employees discharging their duties because *Lawson* extended coverage to private contractors of the public company.[222] One reason why the Supreme Court extended coverage to private contractors is that securities violations occurred despite oversight from third-party advisory firms.[223] By extending coverage, the Court's goal was to ensure protection of private contractors that blew the whistle. If auditors and lawyers further removed from the company are protected under SOX, it only makes sense to protect auditors and lawyers of the public company. The Supreme Court realized that extending protection to private contractors was the best means for carrying out the intent Congress had when it enacted SOX. In a similar manner, in order to prevent future corporate scandals, it is in the courts'

216. Lawson v. FMR LLC, 134 S. Ct. 1158, 1169–71 (2014) (stating the Congressional intent behind enacting SOX).

217. Sarbanes-Oxley Act of 2002 §§ 401–409.

218. *See* Kleinbrodt, *supra* note 174, at 126 ("One of Garcetti's major deficiencies is that it incentivizes employees to publicly voice their concerns before they utilize internal channels of communication."); *see also* Garcetti v. Ceballos, 547 U.S. 410, 427 (2006) (Stevens, J., dissenting) (stating similar reasoning).

219. *See supra* note 114 and accompanying text.

220. *See supra* note 116 and accompanying text.

221. *See supra* note 117 and accompanying text.

222. *See generally* Lawson v. FMR LLC, 134 S. Ct. 1158 (2014).

223. *See* McCarthy, *supra* note 12, at 144 ("One troubling aspect of these scandals was that they occurred despite oversight from the corporations themselves and from outside advisers such as law firms, accounting firms, and other contractors.").

best interest to uphold the line of reasoning in *Yang* and extend coverage to public employees that are discharging their duties.

CONCLUSION

There are many reasons why SOX can be criticized as a failing law.[224] However, it is important to keep in mind that SOX was the first whistleblower statute that provided protection to employees of public companies.[225] Although this does not excuse the haste with which the bill was drafted, nor its consequent deficiencies, it does show that SOX was a direct response to a scandal that devastated the financial markets.[226] Congress, when drafting the bill, had a single purpose: to protect investors against corporate fraud through increased transparency, accountability, and whistleblower protection.[227] With this purpose in mind, every court should follow the *Yang* decision and extend protection under SOX to employees discharging their duties. History, both before and after SOX, validates this argument and compels the courts to shift their focus when interpreting the scope of SOX. There have been debates over who is covered under SOX and whether employees discharging their duties should be protected.[228] Instead of asking who is covered under SOX, the analysis should focus on what is covered under SOX and why. By focusing on the latter two questions, the need to ask who is covered is eliminated, and the focus properly shifts back to preventing corporate fraud through the integral role of whistleblowers in publicly traded companies.

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224. *See generally* Brite, *supra* note 73.

225. S. REP. NO. 107-146, at 19 (2002).

226. *Enron Files for Bankruptcy*, *supra* note 58 (describing the consequences of Enron's failure).

227. *Lawson*, 134 S. Ct. at 1158 (describing SOX's purpose as: "safeguard[ing] investors in public companies and restor[ing] trust in the financial markets").

228. *See, e.g.*, Yang v. Navigators Grp., Inc., 18 F. Supp. 3d 519 (S.D.N.Y 2014).

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